

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	CG Docket No. 02-278
	)	CG Docket No. 05-338
Petition of INTER-MED, INC. d/b/a VISTA	)	
DENTAL PRODUCTS for Retroactive Waiver of	)	
47 C.F.R. § 64.1200(a)(4)(iv)	)	

**PETITION FOR WAIVER**

Pursuant to Section 1.3 of the Federal Communications Commission's ("FCC" or the "Commission") regulations, 47 C.F.R. § 1.3, Inter-Med, Inc. d/b/a Vista Dental Products ("Vista Dental") respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) (the "Opt-Out Rule") for facsimile transmissions sent by or on behalf of Vista Dental, on or before April 30, 2015, with the prior express consent or permission of the recipient. Vista Dental's waiver request is supported by good cause and consistent with the public interest as well as multiple previous waivers granted by the Commission.

**I. FACTUAL BACKGROUND**

***A. Vista Dental***

Vista Dental is a leading producer and provider of innovative, high-quality dental products. Founded in 1997, it is based in Racine, Wisconsin. In the course of its business, Vista Dental provides information about available products and special discount pricing to customers and potential customers; mostly, dental practice groups. Vista Dental has utilized fax advertising in limited cases, via faxes to customers and potential customers from whom it has received prior express consent and/or with whom it has an established business relationship.

***B. Pending Telephone Consumer Protection Act (“TCPA”) Class Action***

Vista Dental is in the same position as multiple companies that have previously petitioned the Commission and received waivers. Vista Dental became aware that it had potential liability for not including opt-out language on certain faxes on September 11, 2015, when it was served with a lawsuit and putative class action brought by Hannahan Endodontic Group, P.C., in the U.S. District Court for the Eastern District of Wisconsin (“Hannahan Complaint”).<sup>1</sup> The Hannahan Complaint alleges, on behalf of Hannahan and a putative class of similarly situated businesses, that Vista Dental violated the Telephone Consumer Protection Act (“TCPA”) by sending faxes that did not contain opt-out language, including where the recipient expressly consented to receiving such faxes.<sup>2</sup>

Vista Dental disputes the allegations in the Hannahan Complaint; however, it has reviewed and modified its internal practices nonetheless to ensure that every fax it sends out complies with the TCPA and the Commission’s Opt-Out Notice Rule. Vista Dental fully understands the importance of complying with these requirements.

***C. The Telephone Consumer Protection Act and the Commission’s Prior Rulemaking***

The TCPA, enacted in 1991 and amended by the Junk Fax Prevention Act of 2005, prohibits the use of a fax machine to send an unsolicited fax advertisement unless:

- (i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;
- (ii) the sender obtained the number of the telephone facsimile machine through—
  - (I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

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<sup>1</sup> See *Hannahan Endodontic Group, P.C. v. Inter-Med, Inc. d/b/a Dental Vista Products*, Civil Action No. 2:15-cv-01038 (E.D. Wis.).

<sup>2</sup> *Id.*, Dkt. 1 (Class Action Complaint), ¶ 23.

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, ...; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),....<sup>3</sup>

Paragraph (2)(D) of the TCPA authorized the Commission to make rules to “provide that a notice contained in an *unsolicited advertisement* complies with the requirements under this subparagraph only if” the fax has a clear and conspicuous notice on the first page of the unsolicited advertisement stating that the recipient can request to opt-out of any future unsolicited advertisements sent by fax.<sup>4</sup> The Commission enacted just such a rule.<sup>5</sup> “Unsolicited advertisement” is defined as “material advertising the commercial availability of or quality of any property, goods, or services which is transmitted to any person *without that person’s express invitation or permission*, in writing or otherwise.”<sup>6</sup> The Commission issued an order in 2006 stating that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”<sup>7</sup> Thus, as the Commission has recognized, the statutory language, accompanying rule, and 2006 Order were confusing as to whether faxes sent pursuant to prior express consent required opt-out language.

On October 30, 2014, the FCC published an order in response to a petition by Anda Inc., holding that the 2006 Order created confusion as to when a fax advertisement must contain an opt-out notice when sent to persons granting prior permission or consent.<sup>8</sup> The

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<sup>3</sup> 47 U.S.C. § 227(b)(1)(C).

<sup>4</sup> 47 U.S.C. § 227(b)(1)(D) (emphasis added).

<sup>5</sup> 47 C.F.R. § 64.1200(a)(4)(iii).

<sup>6</sup> 47 U.S.C. § 227(a)(5) (emphasis added).

<sup>7</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (“2006 Order”).

<sup>8</sup> *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998, FCC 14-164 (Oct. 30, 2014) (“Anda Order”), ¶15.

Anda Order invited persons similarly situated to Anda to file petitions for a retroactive waiver of the opt-out notice requirement.<sup>9</sup> On August 28, 2015, the Commission granted waivers to more than 100 petitioners who were similarly situated to Anda, including several petitioners who filed their petitions after April 30, 2015.<sup>10</sup>

## **II. GOOD CAUSE EXISTS FOR GRANTING VISTA DENTAL'S WAIVER REQUEST**

Good cause exists for a retroactive waiver of the Opt-Out Rule as it relates to any failure by Vista Dental or its agents to comply with the Rule's opt-out notice requirements for facsimile transmissions sent to recipients who provided prior express permission or consent.<sup>11</sup> The Commission has already reached this conclusion in the Anda Order and the 2015 Order.<sup>12</sup> As the Commission recognized, good cause is based on the inconsistency between a footnote to the 2006 Order and the Opt-Out Rule, which "caused confusion or misplaced confidence" regarding the applicability of the Opt-Out Rule to facsimiles sent with prior express permission.<sup>13</sup> The inconsistency, as the Commission has noted, contributed to substantial uncertainty surrounding the opt-out notice requirements for *solicited* fax advertisements.

Here, like the petitioners who were granted retroactive waivers in the Anda Order and the 2015 Order, Vista Dental was operating in a confusing and uncertain environment with respect to whether fax advertisements sent with the recipient's prior express invitation

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<sup>9</sup> Anda Order ¶22.

<sup>10</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 2-278, 5-338, Order, 30 FCC Rcd 8598, DA 15-976 (Aug. 28, 2015) ("2015 Order"). Reliant Services Group, LLC d/b/a Reliant Funding, for example, filed its waiver petition on June 16, 2015. *Id.* fn. 2.

<sup>11</sup> See 47 C.F.R. § 64.1200(a)(4)(iii). Nothing in this Petition constitutes or should be construed as an admission that Vista Dental has violated any provision of the TCPA with respect to advertising faxes or otherwise.

<sup>12</sup> Anda Order ¶ 22; 2015 Order ¶19.

<sup>13</sup> Anda Order ¶24 (citing the 2006 Order footnote 154).

or permission required the opt-out notice.<sup>14</sup> The Commission has already decided that such retroactive waivers will serve the public interest because the “confusion or misplaced confidence . . . left some businesses potentially subject to significant damage awards” and that “on balance . . . it serves the public interest . . . to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward.”<sup>15</sup> Based on this finding, the Commission granted a retroactive waiver to all of the petitioners explicitly referenced in the Anda Order and invited other “similarly situated parties” to seek retroactive waivers as well.<sup>16</sup>

Granting Vista Dental’s waiver request is in the public interest, and necessary to give Vista Dental the same protection, and same treatment, granted the prior petitioners. Vista Dental is in the same position as these prior petitioners, many of whom had also been named in lawsuits seeking enormous penalties under the TCPA even for faxes sent with the recipient’s prior express consent or permission. Holding Vista Dental liable for such faxes, given the prior confusion, and given the Commission’s previous approval of identical waivers, would be inequitable and unjust. *Cf.* 47 C.F.R. § 1.925(b)(3)(i)-(ii) (waiver appropriate where “[t]he underlying purpose of the rule(s) would not be served” or where waiver would avoid an outcome that is “inequitable, unduly burdensome or contrary to the public interest.”).

### **III. CONCLUSION**

For the foregoing reasons, Vista Dental respectfully requests that the Commission grant it a waiver of 47 C.F.R. § 64.1200(a)(4)(iv), effective retroactively, for faxes sent by

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<sup>14</sup> *Id.* ¶26.

<sup>15</sup> *Id.* ¶27.

<sup>16</sup> *Id.* ¶30.

or on behalf of Vista Dental through April 30, 2015, with the recipient's prior express invitation or permission.

Respectfully submitted this 4<sup>th</sup> day of November, 2015.

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A handwritten signature in black ink, appearing to read 'Gregory T. Everts', is written over a horizontal line.

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